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No. 77-488

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 553 F. 2d 651. The initial opinion of the Armed Services Board of Contract Appeals (Pet. App. B) is reported at 72-2 BCA para. 9605. The Board's opinion on remand (Pet. App. C) is reported at 76-1 BCA para. 11,884, and its denial of the motion for reconsideration at 76-2 BCA para. 12,005.

JURISDICTION

The judgment of the Court of Claims was entered on April 20, 1977. Petitioner's motion for rehearing was denied on June 24, 1977. Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including September 28, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner's contract with the Navy authorized an upward rate adjustment for bunker fuel increases.

STATEMENT

Petitioner, a common carrier by water within the Shipping Act of 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, entered into a contract with the Military Sea Transportation Service (now the Military Sealift Command ("MSC")) of the Department of the Navy for the transportation of containerized cargo between the United States and various foreign ports from July 1, 1970, to June 30, 1971 (see Pet. App. A, pp. 1a-7a). Petitioner executed all shipping orders it received during the contract period at the rates provided in the contract (Pet. App. B, p. 19b). However, on January 4, 1971, petitioner applied to MSC for a bunker fuel surcharge because of a "drastic increase in the cost of bunker fuel * * * world-wide" (Pet. App. A, p. 7a). The contracting officer rejected the application on the ground that the contract did not provide for such a surcharge (*ibid.*).

On January 18, 1971, petitioner, purporting to act in accordance with Article I:9(b) of the contract,[1] nominated, as an additional item of cost, a bunker surcharge of $2 per measurement ton to cover bunker fuel

[1]Article I:9 provided (see Pet. App. A, pp. 4a-5a):

(a) As a means of facilitating the administration of this Agreement, the parties have agreed that certain specific items of cost anticipated as likely to arise in the performance of their respective duties under Articles I:5, I:6 and I:8 shall be listed, and the responsibilities of the parties indicated, in a schedule attached hereto as Appendix B * * * and made a part of this Agreement. Determinations of responsibility for specific items of cost agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6 and I:8; provided, however, in the event of conflict, the specific language of Appendix B shall prevail.

(b) Either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B. Such nominating party shall serve upon the other party a written nomination, together with a detailed statement of all pertinent facts and appropriate supporting data necessary for a determination of the cost responsibility under Articles I:5, I:6 and I:8. If the other party agrees in writing to the nomination, such nomination will be incorporated into Appendix B as of the agreed effective date. Failure of the other party to agree to the nomination within a period of thirty (30) days from its receipt, or within a mutually agreeable greater period, shall constitute a dispute concerning a question of fact within the meaning of that term in the Article entitled "Disputes" in Part III of this Agreement.

price increases (Pet. App. A, p. 7a). The contracting officer rejected petitioner's nomination, and the Armed Services Board of Contract Appeals affirmed (Pet. App. A, pp. 7a-8a). The Board held that petitioner's interpretation of Article I:9(b) would frustrate the principal purpose of the relevant contract provisions, which was "to place the risk of increases in bunker fuel costs (and the benefit of any decline) on the carrier" (Pet. App. B, p. 23b).

Petitioner sought review of the Board's decision under the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321 and 322.[2] The Court of Claims granted summary judgment in favor of the government, holding (Pet. App. A, p. 10a):

[2]The Court of Claims initially remanded the case to the Board of Contract Appeals to determine whether the increase in the cost of bunker fuel was foreseen or reasonably foreseeable by petitioner when it entered into the contract. The Board found that the price increases were not foreseen by petitioner and that they were not reasonably foreseeable (Pet. App. C, pp. 1c-44c).

> * * *[T]he contract is a fixed price contract under which [petitioner] was to furnish specified services for specified payments for a period of one year. There was no provision for escalating the amounts that would be paid to [petitioner]. [Petitioner] would engraft an escalation clause on the fixed price contract, which cannot be done in the circumstances of this case.* * * [The increase in price of the bunker fuel] was a risk it assumed under the terms of the contract.

ARGUMENT

The Court of Claims' interpretation of these contract clauses to preclude recovery of increases in bunker fuel prices is correct. It also lacks prospective importance. All subsequent contracts between the Military Sealift Command and ocean common carriers have contained a clause permitting adjustments to accommodate bunker fuel cost fluctuations and have provided for revision of rates at six-month intervals. They do not include paragraph (b) of Article I:9. Accordingly, this case does not warrant review by this Court.

1. Petitioner's principal contention is that recovery of bunker fuel price increases is authorized by Article I:9 of the contract, particularly the first sentence of Article I:9(b), which states that "[e]ither party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B" (Pet. App. A, p. 5a). Petitioner argues that an interpretation precluding recovery of price increases would render this article "meaningless" (Pet. 9-11).

Petitioner misconceives the purpose of the nomination procedure. Appendix B of the contract (Pet. App. B, pp. 10b-13b) allocates the responsibility for categories of cost to either the carrier or the government. "Appendix B

describes costs only by nature, kind, or character without regard to any dollar amount and without any warranty against inclusion of contingency factors in rates" (Pet. App. A, p. 11a). The nominating procedure in Article I:9(b) provided a mechanism whereby either party can propose that responsibility for a listed category of cost be shifted or that additional categories of cost be added.[3]

By contrast, petitioner sought to shift responsibility for increases in the cost of a category that had already been allocated to the carrier. The contract made no provision for the shifting of increases in cost of items the responsibility for which had already been allocated. As the Court of Claims stated (Pet. App. A, p. 11a):[4]

> Contrary to [petitioner's] assumption, the contract * * * is cast in terms which provide that the risk of dollar increases in cost of the items of cost assigned to the carrier shall be covered by the stipulated rates. Article I:5(a)(i) makes transportation of the container * * * the basic service for which rates are to be paid. Article I:3 makes the rates the compensation to be paid. Appendix B1c(13) makes costs in connection with the operation of the vessel [which includes bunker fuel costs] part of the cost responsibility of the carrier.

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[3]Should the carrier or the government assume new responsibilities as a result of such nomination, any change in price would be negotiated to reflect the change in cost responsibility.

[4]There is nothing in the record supporting petitioner's apparent assertion (Pet. 12) that it was the purpose of Article I:9 to provide adjustments for unforeseen or unforeseeable cost changes. The Board "found nothing * * * which would support [petitioner's] view that freight rates can be escalated under Article I:9(b) to reflect increased costs of bunker fuel" (Pet. App. B, p. 20b).

Accordingly, the Court of Claims correctly concluded that "[t]he nomination of the increased cost of fuel was neither the nomination of a change to an existing item, nor the nomination of an additional item" (Pet. App. A, p. 11a; emphasis omitted). This conclusion is further supported by the language of Article I:9 itself, which requires that determination of "responsibility for specific items of cost agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6, and I:8" (Pet. App. A, pp. 4a-5a). Article I:5 in turn states that the carrier "shall be paid at the basic rates set forth in the schedule of rates" (Pet. App. A, p. 3a), and "under Article I:20 the specified rates were to continue unchanged for the period of one year" (Pet. App. A, p. 10a). Petitioner's "nomination [did] not comply with this article" (Pet. App. A, p. 11a).[5]

2. Petitioner contends (Pet. 13) that the government subsequently acknowledged its obligation to pay the bunker fuel increases by adding an escalation clause to the follow-on contract to cover fluctuations in cost of bunker fuel. The Board specifically found, however, that "MSC has not issued any interpretation inconsistent with that expressed by the contracting officer in connection with the present claim" (Pet. App. B, p. 19b). "It is well settled that only actions and interpretations which occur before a controversy arises are relevant in determining and interpreting the meaning of a contract. See *Liles Constr. Co.* v. *United States*, 197 Ct. Cl. 164, 455 F. 2d 527

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[5]Petitioner argues (Pet. 12-13) that any ambiguity in Article I:9 should be resolved against the government, which drafted the contract. But as the Court of Claims concluded (Pet. App. A, p. 12a), Article I:9 "is unambiguous and there is no requirement that it be construed against the government. *See ITT Arctic Services, Inc.* v. *United States*, [524 F. 2d 680 (Ct. Cl.)]."

(1972); and *Dynamics Corp. of America* v. *United States*, 182 Ct. Cl. 62, 389 F. 2d 424 (1968)" (Pet. App. A, p. 12a).

3. Petitioner also asserts (Pet. 12) that in interpreting the contract the Court of Claims should have considered the alleged custom of the trade in assessing bunker fuel surcharges. But as the Court of Claims noted, "there was no evidence as to the custom of the trade, except that relating to custom in 1972, and thereafter, after [petitioner's] contract had expired and escalation provisions had been inserted in follow-on contracts" (Pet. App. A, p. 12a). In any case, Article I:12 of the contract makes "custom of the trade" applicable only "[w]herever the 'Custom of the Trade' is the standard of performance * * * under the provisions of these basic Terms" (Pet. 9, n. 19). "Custom of the trade" is not referred to in Articles I:9, I:3, or I:5(a), or in Appendix B.[6]

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[6]The Court of Claims' decision is not in conflict with *DeBry and Hilton Travel Services, Inc.* v. *Capitol International Airways, Inc.*, 541 F. 2d 855 (C.A. 10), which turned on a clause subjecting the contract to the terms of tariffs on file with the Civil Aeronautics Board. There was no such clause in petitioner's contract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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